

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i> ,)	
)	
Defendants.)	

**REPLY IN FURTHER SUPPORT OF
STATE OF OKLAHOMA’S MOTION FOR RECONSIDERATION
OF THE COURT’S JULY 24, 2009 OPINION AND ORDER [DKT #2379]**

COMES NOW the Plaintiff, the State of Oklahoma (“the State”), and submits this reply in further support of its Motion [DKT # 2443] asking the Court for reconsideration of its July 24, 2009 Opinion and Order [DKT #2379] striking certain of the State’s declarations submitted for *Daubert* purposes.

I. The State’s motion is not moot, because it obeyed the Court’s direction to file a written motion, rather than present its motion orally.

On July 28, 2009 counsel for the State asked the Court for leave to orally reconsider its order [DKT # 2379] striking certain of the declarations the State had tendered in its *Daubert* case *before* the *Daubert* motions were to be heard. The Court responded that it did not have time to consider that motion at that time, and invited the filing of a written motion. The State did so, and now the Defendants argue that the Court has already ruled, so its motion is moot. *See* DKT # 2453, pp. 5-9. Because the State was prepared to make a timely and specific oral motion for reconsideration, it can hardly be subjected to a finding of mootness for deferring at the Court’s direction its oral motion and filing the written motion the Court invited. Such a result would be fundamentally unfair and a deprivation of due process.

II. Additional expert declarations responding to *Daubert* challenges are permissible.

The Court has found various aspects of the State's expert case unreliable based, in part, upon the improper exclusion of the State's tendered evidence. The Court acted based upon the premise that the expert report disclosure requirement of Rule 26(a)(2)(A) applies to *non-testifying* consulting experts. It does not. Thus the absence of (non-required) expert reports is no basis to exclude competent evidence in making *Daubert* determinations. Defendants assert that "Rule 26 and the Court's scheduling orders dictate *how* and *when* the Plaintiffs' [sic] expert opinions must be provided to the Defendants." See DKT # 2453, p. 10. The State agrees with this uncontroversial statement. However, when Defendants go on to assert that the State had a duty to "long ago" submit Rule 26 disclosures for its *non-testifying* consulting experts Drs. Chappell, Loftis, Macbeth, Sadowsky, and Weidhass, they have no basis in Rule 26, the Court's scheduling orders, or in any cited authority.¹ Defendants similarly speak without legal support for their assertion that the *Daubert* declarations of Drs. Olsen, Teaf, and Fisher were "untimely." *Id.*

III. No Rule 26(a) violation occurred by the submission of additional scientific support for the State's *Daubert* case.

Defendants miscite *Woodworkers Supply Inc. v. Principal Mutual Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999), for the (undisputed) proposition that the Court has discretion in the admission of evidence, or in determining if expert declarations are admissible for *Daubert* or summary judgment purposes. See DKT # 2453, pp. 4, 11. *Woodworkers* involved a violation of Rule 26(a), which is not present here, and it articulated factors to determine if that violation is

¹ Defendants concede they learned the names and roles of Drs. Chappell, Loftis, Macbeth, Sadowsky, and Weidhass in the preparation of the State's scientific case and do not dispute that, like Dr. Macbeth, the State would have allowed the deposition of any of these experts had the Defendants asked. See DKT # 2453, p. 10, fn. 4.

harmless. Reliance upon *Woodworkers* is unfounded since the State committed no Rule 26(a) violation by not providing expert reports for its *non-testifying* expert consultants.

IV. The Court misapplied the legal standard by excluding the State's declarations, abused its discretion, and prejudiced the State.

Defendants fail to address the argument and authority presented by the State to the effect that Rule 26(a) does not require presentation of expert disclosures for *non-testifying* expert consultants, which was one of the principal bases for the Court's opinion [DKT #2379]. Nor do Defendants address the fact that the State does not intend to call its *non-testifying* experts, who submitted declarations for *Daubert* purposes, at trial, which was another misapprehension in the Court's order. By striking and failing to consider important relevant scientific evidence on legally erroneous grounds, the Court has undermined its gatekeeper function under *Daubert*. The State respectfully submits that the Court's decisions in this regard are clear error and exceed the bounds of permissible choice in the circumstances, amounting to an abuse of discretion.

V. Conclusion

The State respectfully asks the Court to reconsider its Order [DKT # 2379], give consideration to the stricken declarations, and, after proper consideration, render fully informed *Daubert* rulings, particularly reinstating the opinions of Drs. Harwood and Olsen regarding PCR and PCA.

Respectfully Submitted,

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